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Supreme Court, U.S.
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No. (1)

IN THE

Supreme Court of the United States

CARL M. DRURY, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

28 U.S.C. § 2255 ¶ 6(1) provides that a motion for relief pursuant to this statute shall be filed in circumstances here relevant within one year from the date an inmate's conviction becomes "final."

In this context, does a conviction become final at the time the Supreme Court denies a petition for certiorari on the direct appeal, or does it become final after the Supreme Court has issued a decision denying a petition for rehearing?

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PETITION FOR WRIT OF CERTIORARI

Carl M. Drury, Jr., respectfully petitions for a writ of certiorari to review the opinion of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit, dated November 13, 2007, is officially reported at 507 F. 3d 1295, and is reproduced at App. A.

The order of the U.S. Court of Appeals for the Eleventh Circuit on petition for rehearing and petition for rehearing en banc, dated January 14, 2008, is reproduced at App. B.

The order of the U.S. District Court for the Southern District of Georgia, dated April 9, 2007, is unofficially reported at 2007 WL 1100497, and is reproduced at App. C.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on November 13, 2007, and the petitioner's timely filed petitions for rehearing and rehearing en banc were denied on January 14, 2008. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.3, because it is being filed within 90 days of the entry of the order denying the petitions for rehearing. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant statutory provision involved is 28 U.S.C. § 2255 ¶ 6(1) of the Antiterrorism and Effective Death Penalty Act. The statute is reproduced at App. D.

STATEMENT OF THE CASE

In 2001, Petitioner Drury was indicted by a federal grand jury for violation of 18 U.S.C. § 1958 (murder for hire), and possession of a firearm in connection with a crime of violence under 18 U.S.C. § 924(a). Drury was convicted on all counts following a jury trial, and his sentences totaled 204 months. Drury appealed and the convictions and sentences were affirmed. United States v. Drury, 396 F. 3d 1303 (11th Cir. 2005). Drury filed a petition for a writ of certiorari which was denied by the Supreme Court on October 3, 2005. Drury v. United States, 546 U.S. 813 (2005). Drury's petition for rehearing was denied on November 28, 2005. Drury v. United States, 546 U.S. 1055 (2005).

Drury then initiated the instant proceedings by filing for relief under 28 U.S.C. § 2255 in the district court on November 27, 2006. The relevant section of 28 U.S.C. § 2255 provides that such a motion be filed within one year from the date on which the conviction becomes final. Drury's § 2255 motion was filed more than one year after the denial by of his petition for certiorari, but within one year of the denial of his petition for rehearing. The magistrate judge issued a report and recommendation concluding that Drury's § 2255 motion should be dismissed as untimely. On April 9,

2007, the district court adopted the magistrate's report and dismissed Drury's § 2255 motion as having been untimely filed. After timely filing a notice of appeal and subsequent motion for a certificate of appealability, Drury was granted a certificate of appealability on the timeliness of his § 2255 motion. (App. E). On November 13, 2007, the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court by a panel decision. (App. A). Drury's petitions for rehearing and rehearing en banc were denied January 14, 2008. (App. B). Drury now petitions for a writ of certiorari.

ARGUMENT

The decision of the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's dismissal of Petitioner Drury's § 2255 motion for having been filed outside the one-year limitation prescribed by 28 U.S.C. § 2255 ¶ 6(1). The Eleventh Circuit's opinion holds that the one-year limitation runs from the date of denial of a petition for a writ of certiorari, even when a petition for rehearing is pending before the Supreme Court. This Court should grant certiorari to review whether the lower court's holding effectively deprives an inmate who has filed for a rehearing of a denial of a writ of certiorari the full one-year period for filing a § 2255 motion prescribed by Congress.

1. A conviction is not "final" under § 2255 until the Supreme Court denies a petition for rehearing.

Under the circumstances applicable to this petition, a motion under 28 U.S.C. § 2255 must be filed within one year from the date the movant's

conviction becomes final. 28 U.S.C. § 2255 ¶ 6(1). In holding that a petition for rehearing with the Supreme Court did not toll the one-year period beyond the date that the petition for a writ of certiorari was denied, following the decisions of a number of other circuits, the Eleventh Circuit's decision relied in great part on Supreme Court Rule 16.3, entitled "Disposition of a Petition for a Writ of Certiorari," which provides:

> Whenever the Court denies a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice.

Sup. Ct. R. 16.3. The Eleventh Circuit held that the language of the rule stating that "[t]he order of denial will not be suspended pending disposition of a petition for rehearing" meant that a conviction was final at the time of the order of denial. (App. A).

This holding effectively reduces the time for filing a § 2255 motion when a petition for rehearing is filed, thereby judicially diminishing a right afforded to prisoners by Congress. This is so, because an inmate may not initiate post-conviction proceedings while his direct appeal is still pending. In McIver v. United States, 307 F. 3d 1327, 1388 (11th Cir. 2002) (footnote 2), the Eleventh Circuit

stated in dicta that "clear precedent of this Court directs that collateral claims should not be entertained while a direct appeal is pending." When a petition for rehearing is filed, there remains pending an action of the Supreme Court until the petition is granted or denied. In this sense, the direct appeal of the conviction is not yet final, and a collateral motion under § 2255 motion cannot normally be filed.

This proposition is consistent with the reasoning of a number of other circuits. In United States v. Cook, 997 F. 2d 1312 (10th Cir. 1993), a prisoner filed a § 2255 motion while his direct appeal was still pending before the Court of Appeals. The court held that the § 2255 motion, which had been filed in the alternative as a motion to dismiss and a motion for new trial, could not be treated as a § 2255 motion. The court stated, "Absent extraordinary circumstances, the orderly administration of criminal justice precludes a district court from considering a § 2255 motion while review of the direct appeal is still pending. Id. at 1319. Similar reasoning has been applied in United States v. Taylor, 648 F. 2d 565, 572 (9th Cir. 1981), stating "[t]he District Court may entertain a collateral motion during the pendency of a direct appeal if 'extraordinary circumstances' outweigh the considerations of administrative convenience and judicial economy"; and Capaldi v. Pontesso, 135 F. 3d 1122, 1124 (6th Cir. 1998), holding "we now adopt the rule espoused by multiple Circuits that in the absence of extraordinary circumstances, a district court is precluded from considering a § 2255 application for relief during

pendency of the applicant's direct appeal." The reason for these holdings lies in the judicial need to minimize "the risk of duplicitous and conflicting judicial administration . . . inasmuch as the disposition of the direct appeal may render the [§ 2255] motion moot." United States v. Taylor at 572.

While these cases address the situation of a § 2255 filed during pendency of a direct appeal before the Court of Appeals, it stands to reason that the opinions would extend to an appeal pending action on a petition for rehearing with the Supreme Court. A petition for rehearing is not a mere formality, and it is no less likely to render a § 2255 motion moot or cause conflicting decisions in the same case to be issued by a higher and lower court. Therefore, in the case of an inmate who exhausts his direct appeal options with the Supreme Court by the filing of a petition for rehearing, the one-year limitation cannot logically already be running with the denial of certiorari. This result would lead to inmates who take advantage of their full direct appeal options being denied their full one-year to file a collateral appeal. Therefore, the one-year limitation of § 2255 must begin running when a petition for rehearing is denied by the Supreme Court. Only at this point would no further action be possible on the direct appeal, the possibility of conflicting actions by a higher and lower court removed, and the conviction "final" according to that term's ordinary meaning.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-12130
Non-Argument Calendar

D.C. Docket Nos.
06-00284-CV-DHB & 01-00028-CR-DHB

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
November 13, 2007
THOMAS K. KAHN
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CARL M. DRURY, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appelee,

Appeal from the United States District Court
for the Southern District of Georgia

(November 13, 2007)

Before CARNES, MARCUS and PRYOR, Circuit Judges.

MARCUS, Circuit Judge:

Carl M. Drury, Jr., a federal prisoner proceeding pro se, appeals the dismissal of his motion to vacate, filed pursuant to 28 U.S.C. § 2255, as barred by the one-year statute of limitations of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996). We granted a certificate of appealability on the issue of whether the statute of limitations began to run when the Supreme Court denied Drury's petition for certiorari or when it denied his petition for rehearing of the denial of certiorari.

The Supreme Court denied Drury's petition for certiorari on October 3, 2005. Drury v. United States, 546 U.S. 813, 126 S.Ct. 336, 163 L.Ed.2d 48 (2005). If the statute of limitations began then, Drury had until October 3, 2006 to file his § 2255 motion. The Supreme Court denied his petition for rehearing on November 28, 2005. Drury v. United States, 546 U.S. 1055, 126 S.Ct. 716, 163 L.Ed.2d 613 (2005). Drury, through counsel, filed this § 2255 motion to vacate on November 27, 2006, which was more than one year after the denial of the petition for certiorari, but less than one year after the denial of his petition for rehearing.

We review de novo the district court's determination that a § 2255 motion to vacate is time-barred. Jones v. United States, 304 F.3d 1035, 1037 (11th Cir.2002). The AEDPA imposes a one-year statute of limitations for filing a § 2255 motion to vacate, which begins to run following one of four events, the relevant trigger in this case being "the

date on which the judgment of conviction becomes final." 28 U.S.C. § 2255. The Supreme Court has held that "[f]inality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." Clay v. United States, 537 U.S. 522, 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003). Likewise, we have held that a conviction becomes final the day the Supreme Court denies a petition for certiorari or issues a decision on the merits. Washington v. United States, 243 F.3d 1299, 1300-01 (11th Cir.2001).

While neither this Court nor the Supreme Court has addressed the impact of the filing of a petition for rehearing on the one-year statute of limitations under 28 U.S.C. § 2255, Supreme Court Rule 16.3, entitled "Disposition of a Petition for a Writ of Certiorari," provides:

> Whenever the Court denies a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice.

Sup.Ct. R. 16.3 (emphasis added). Thus, by its unequivocal language, Rule 16.3 states that a petition for certiorari review is resolved when the Court denies review, unless the Supreme Court or a

Justice intervenes, neither of which occurred at any point in the process in Drury's case.

This conclusion is consistent with the decisions of six of our sister courts to have considered the issue. See In re Smith, 436 F.3d 9, 10 (1st Cir.) (applying Sup.Ct. R. 16.3 and holding that a "conviction becomes final for purposes of triggering the one-year limitations period of section 2255 when certiorari is denied, regardless of whether a petition for rehearing is filed or when such petition is denied "), cert. denied, --- U.S. ----, 127 S.Ct. 284, 166 L.Ed.2d 217 (2006); Robinson v. United States, 416 F.3d 645, 650 (7th Cir.2005) (holding that "petition for rehearing the denial of [petitioner's] certiorari petition had no effect on the finality of his conviction"); cert. denied, 546 U.S. 1176, 126 S.Ct. 1343, 164 L.Ed. 2d 57 (2006); Campa-Fabela v. United States, 339 F.3d 993, 993 (8th Cir.2003) (holding that conviction was final at the denial of petition for writ of certiorari, rather than denial of petition for rehearing); Giesberg v. Cockrell, 288 F.3d 268, 270 (5th Cir.2002) (same); United States v. Segers, 271 F.3d 181, 184 (4th Cir.2001) (holding that "in the absence of an order of the Court or a Justice thereof, a petition for rehearing of the denial of certiorari has no effect"); United States v. Willis, 202 F.3d 1279, 1280-81 (10th Cir.2000) (holding that, based on Sup.Ct. R. 16.3 and absent suspension by an order of the Supreme Court of a Justice, a judgment of conviction is final at the denial of certiorari, "regardless of whether a petition for rehearing from the denial of certiorari is filed.").

We now join our sister circuits and, consistent with the Supreme Court's decision in Clay, hold that finality attaches when the Supreme Court denies a habeas petitioner's petition for certiorari review. Drury's filing of a motion for reconsideration of the Supreme Court's decision did not affect the disposition of his case in the Supreme Court, and we see no reason why such a motion would toll the time for filing a § 2255 motion. Upon the denial of his certiorari petition, Drury's conviction was final for purposes of the AEDPA's limitations period. Accordingly, we discern no error in the district court's dismissal of Drury's § 2255 motion as time-barred.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-12130-EE

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
January 14, 2008
THOMAS K. KAHN
CLERK

CARL M. DRURY, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appelee,

Appeal from the United States District Court
for the Southern District of Georgia

Before CARNES, MARCUS and PRYOR, Circuit Judges.

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having

requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

Carl M. Drury, Jr.,

v. Case No. CV 206-284

United States of America,

ORDER

After a careful de novo review of the record in this case,[1] the Court concurs with the Magistrate Judge's Report and Recommendation, to which objections have been filed. Accordingly, the Report and Recommendation of the Magistrate Judge is ADOPTED as the opinion of the Court. Also, a certificate of appealability may issue only if Movant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). As demonstrated by the Magistrate Judge's Report and Recommendation, which is now adopted as the opinion of this Court, Movant has not made the requisite showing. Accordingly, Movant's request for a Certificate of Appealability is hereby DENIED.

SO ORDERED this 9th day of April, 2007, at August, Georgia.

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[1] This Court's review of the Magistrate Judge's Report and Recommendation on a motion to dismiss a § 2255 petition is always de novo. Fed.R.Civ.P. 72(b). Accordingly, Movant's request for de novo review is DENIED AS MOOT.

s/ Dudley H. Bowen, Jr.
United States District Court

MAGISTRATE'S REPORT AND RECOMMENDATION

G.R. SMITH, United States Magistrate Judge.

Movant has filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his federal prison sentence. The government has filed a motion to dismiss the instant motion as untimely. Doc. 9. Movant has filed a response in opposition to the government's motion to dismiss. Doc. 12. Because the motion is barred by the statute of limitations applicable to § 2255 motions, the Court recommends that the government's motion be GRANTED and the instant motion be DISMISSED.

I. Background

On September 14, 2001, a grand jury indicted movant on four counts of using an interstate commerce facility in the commission of a murder for hire in violation of 18 U.S.C. § 1958 and one count of possession of a firearm in connection with a crime of violence in violation of 18 U.S.C. § 924(a). CR201-028, doc. 14. A jury convicted movant on all the counts charged in the indictment on February 21, 2002. Id., doc. 93. The Court sentenced movant to 144 months' imprisonment on the murder for hire counts and a consecutive 60 months' imprisonment on the possession of a firearm conviction. Id., doc. 98.

Movant appealed his convictions and sentences and the Eleventh Circuit affirmed them on January 18, 2005. United States v. Drury, 396 F.3d 1303 (11th Cir.2005). The United States Supreme Court denied movant's petition for writ of certiorari on October 3, 2005. Drury v. United States, ---U.S. ----, 126 S.Ct. 336, 163 L.Ed.2d 48 (2005). The Supreme Court denied rehearing on movant's petition on November 28, 2005. Drury v. United States, --- U.S. ----, 126 S.Ct. 716, 163 L.Ed.2d 613 (2005). Movant, through counsel, filed the instant motion on November 27, 2006. Doc. 1.

II. Analysis

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) amended § 2255 to require a movant to file a § 2255 motion within one year of the date his conviction becomes final. 28 U.S.C. § 2255 ¶ 6. Movant contends that his motion is timely filed because it was filed within one year after the Supreme Court denied his request for rehearing of the Court's denial of his petition for writ of certiorari. Docs. 1, 12. The government asserts that the instant motion is untimely since it was filed more than one year after the Supreme Court denied movant's petition for certiorari. Doc. 9. The resolution of the government's motion requires the Court to determine at which point a conviction becomes "final" for purposes of evaluating the timeliness of motions brought pursuant to § 2255.

The one-year limitations period applicable to motions made pursuant to § 2255 begins to run from the latest of several specified events. 28 U.S.C. §

2255 ¶ 6. In the instant case, the parties agree that the limitations period begins to run from "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255 ¶ 6(1); see docs. 9, 12. The parties disagree over the meaning of the word "final" as included in this provision, however. The Eleventh Circuit has held that "a conviction is final on the day that the Supreme Court denies a convicted defendant's certiorari petition or renders a decision on the merits." Jones v. United States, 304 F.3d 1035, 1038 n. 5 (11th Cir.2002); see also Washington v. United States, 243 F.3d 1299, 1300 (11th Cir.2001) (per curiam). Movant contends that his judgement of conviction did not become final until the date the Supreme Court denied his request for rehearing on the denial of his petition for a writ of certiorari. Docs. 1, 12.

Neither the Eleventh Circuit nor the Supreme Court has addressed the effect of filing a petition for rehearing on the date a convicted defendant's conviction becomes final for purposes of the commencement of the § 2255 limitations period. The Supreme Court has held that in the postconviction context, "finality has a long-recognized, clear meaning: Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." Clay v. United States, 537 U.S. 522, 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003) (deciding when finality attaches for purposes of postconviction review in a case where a federal prisoner brought an unsuccessful direct appeal but failed to petition for certorari). All of the circuit courts of appeals that

have addressed the issue have rejected the notion that the limitations period runs from the denial of the motion for rehearing rather than from the denial of the petition for writ of certiorari. See In re Smith, 436 F.3d 9, 10 (1st Cir.), cert. denied, --- U.S. ----, 127 S.Ct. 284, 166 L.Ed.2d 217 (2006); Robinson v. United States, 416 F.3d 645, 650-51 (7th Cir .2005), cert. denied, --- U.S. ----, 126 S.Ct. 1343, 164 L.Ed.2d 57 (2006); Campa-Fabela v. United States, 339 F.3d 993, 994 (8th Cir.2003) (per curiam), cert. denied, 541 U.S. 967, 124 S.Ct. 1734, 158 L.Ed.2d 414 (2004); United States v. Segers, 271 F.3d 181, 184 n. 2 (4th Cir.2001) ("the filing in the Supreme Court of a petition for rehearing of the denial of a petition for certiorari has no effect on the finality of the judgment of conviction"); Horton v. United States, 244 F.3d 546, 551 (7th Cir.2001) ("the critical difference for purposes of § 2255 ¶ 6(1) finality between a petition for rehearing before the court of appeals and before the Supreme Court is that the former automatically delays the termination of the court's involvement with the case and the latter does not.... [T]herefore ... a defendant's conviction becomes "final" under § 2255 ¶ 6(1) when the Supreme Court denies the defendant's petition for writ of certiorari (absent a suspension order from the Court or a Justice), irrespective of the opportunity to petition the Supreme Court for rehearing."); United States v. Thomas, 203 F.3d 350, 356 (5th Cir.2000); United States v. Willis, 202 F.3d 1279, 1280-81 (10th Cir.2000) ("judgment of conviction is final for purposes of the one-year limitation period in § 2255 when the United States Supreme Court denies a petition for writ of certiorari after a direct appeal, regardless of

whether a petition for rehearing from the denial of certiorari is filed").

The decisions of these circuit courts specifically rely on Supreme Court Rule 16.3 which provides that

> Whenever the Court denies a petition for writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice.

Sup.Ct. R. 16.3. This rule expressly provides that an order denying certiorari is effective immediately upon issuance absent a specific order of the Court or a Justice, and a judgment of conviction is appropriately considered final at that time. Accordingly, the Court finds the reasoning of these circuits persuasive and finds that a judgment of conviction becomes final for purposes of the § 2255 limitations period upon the Supreme Court's denial of a petition for writ of certiorari, rather than upon its disposition of a petition for rehearing.

The Supreme Court denied movant's petition for writ of certiorari on October 3, 2005. Drury v. United States, --- U.S. ----, 126 S.Ct. 336, 163 L.Ed.2d 48 (2005). The one-year statute of limitations began running at that time, and the last day for movant to file a timely motion pursuant to § 2255 was October 3, 2006. Movant filed the instant petition on November 27, 2006, some fifty-five days

after the expiration of the limitations period. Consequently, movant's § 2255 motion should be DISMISSED as untimely.

Movant contends that if the Court finds that the limitations period has expired and his motion is untimely, then he is entitled to equitable tolling "given the unique circumstances of this case." Doc. 1. Movant further contends that if the Court finds that his motion is untimely and that equitable tolling is not appropriate, then his motion should be considered under the "actual innocence" exception to the § 2255 limitations period. Id.

Movant contends that he "did all he reasonably could to file his motion on time" and enumerates four specific circumstances that entitle him to equitable tolling. Doc. 12. First, movant states that he "necessarily had to enlist the aid of his sons ... and rely on them to arrange for legal counsel to prepare and file a timely § 2255 motion." Id. Movant also states that since he was incarcerated in a correctional facility in Oklahoma, he "was at an added disadvantage in that his sons were unable to visit him to consult about confidential legal matters as easily and as frequently as [he] would have been able to if he had been sent to a federal facility somewhere in the Southeastern United States." Id. Movant next contends that he consulted two attorneys who erroneously advised him that he had one year from the date of the denial of his rehearing petition to file the instant motion. Id. Movant finally asserts that "the Supreme Court Rules discussing the impact of filing for rehearings are less than clear, are confusing and, on their face, arguably

conflict with each other" and since he is "untrained in the law, [his] confusion would have been far from unreasonable." Id.

"In the § 2255 context, equitable tolling 'is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.' " Jones v. United States, 304 F.3d 1035, 1039 (11th Cir.2002) (quoting Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir .1999) (per curiam)). Equitable tolling is an extraordinary remedy which is typically applied sparingly. See Irwin v. Department of Veterans' Affairs, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990). While movant's incarceration may have made it difficult for him to consult with his sons or attorneys, that is not a circumstance that warrants equitable tolling. Incarceration is a circumstance experienced by most individuals seeking relief pursuant to § 2255 and is not peculiar to this movant and is a far cry from the extraordinary circumstances which compel courts to exercise discretion and equitably toll the § 2255 limitations period. Additionally, the fact that movant was incarcerated in a facility that was further from his relatives than he would prefer also falls short of the category of extraordinary circumstances that will excuse an untimely habeas petition. The Bureau of Prisons considers a number of factors in making its decisions as to where to house inmates, and courts afford the Bureau great discretion in making those determinations. See 18 U.S.C. § 3621(b) (providing that the Bureau of Prisons "may designate any available penal or correctional facility that meets the minimum of

health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable"). "Just as an inmate has no justifiable expectation that he will be incarcerated in any particular prison within a State, he has no justifiable expectation that he will be incarcerated in any particular State." Olim v. Wakinekona, 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983). The fact that movant was incarcerated in Oklahoma rather than in the Southeastern United States and was inconvenienced in communicating with his sons and attorneys is simply not the type of extraordinary circumstance which would justify application of the equitable tolling doctrine.

Movant's assertions that he received erroneous legal advice from multiple attorneys also fails to support his assertions for equitable tolling. Mere "attorney negligence is not a basis for equitable tolling, especially when [movant] cannot establish his own diligence in ascertaining the federal habeas filing deadline." Howell v. Crosby, 415 F.3d 1250, 1252 (11th Cir.2005). "An attorney's miscalculation of the limitations period or mistake is not a basis for equitable tolling.... Any miscalculation or misrepresentation by [movant's] attorney in interpreting the plain language of the statute does not constitute an extraordinary circumstance sufficient to warrant equitable tolling." Steed v. Head, 219 F.3d 1298, 1300 (11th Cir.2000). Consequently, movant is not entitled to equitable relief based on the erroneous advice he received

concerning the proper deadline for filing his § 2255 motion. Movant's contention that he is untrained in the law also fails to form a sufficient basis for the exercise of equitable tolling, for "[i]gnorance of the law usually is not a factor that can warrant equitable tolling." Wakefield v. Railroad Retirement Bd., 131 F.3d 967, 970 (11th Cir.1997); see also Turner v. Johnson, 177 F.3d 390, 392 (5th Cir.), cert. denied, 528 U.S. 1007, 120 S.Ct. 504, 145 L.Ed.2d 389 (1999) (petitioner's unfamiliarity with the legal process is not a circumstance warranting equitable tolling, whether the unfamiliarity is due to illiteracy or any other reason).

Movant alternatively contends that the "actual innocence" exception to the one-year limitations period excuses the untimeliness of his motion. A movant may prove actual innocence by showing that "it is more likely than not that no reasonable juror would have convicted him in light of ... new evidence." Schlup v. Delo, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Under this standard, "a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Id. at 329. As evidence of his innocence, movant states that his defense counsel failed "to present the witnesses, evidence, and defenses set forth in [his § 2255 motion]" which raises "grave doubts about the jury's verdict." Doc. 1. The crux of movant's assertion of actual innocence appears to be that his attorneys failed to present evidence that Steven Whatley, a government witness at trial, was having an affair with movant's

wife. See Doc. 8 (affidavits of Grant Balwanz and T.J. Ward). The government contends that this does not qualify as "new evidence" because the facts alleged occurred approximately two years prior to movant's trial. Doc. 9. Furthermore, the government argues that the majority of the testimony against movant was provided by another government agent, Agent Valoze, and his testimony was corroborated by ATF Agent John Limbach. Id. Thus, the government contends that the testimony of these two agents is sufficient to support the jury's verdict and that movant's current allegations do not amount to "new evidence" which undermines confidence in the results of movant's trial. Id.

The evidence that movant offers to establish his "actual innocence" appears to be an attempt to discredit one of the government witnesses who testified against him at trial. "[A] substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare.... To be credible, ... a claim [of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." Schlup, 513 U.S. at 324. The only contention that movant advances in support of his actual innocence claim is that a government witness at trial was having an affair with his wife and that fact calls the agent's credibility into question and creates "grave doubts about the jury's verdict in this case." Doc. 1. Such allegations, even if true, fail to persuade the Court that no reasonable juror would have found movant

guilty if the defense had presented this evidence at trial. Moreover, the defense presented two witnesses at trial who testified that Whatley was untruthful, so the jury weighed the reliability of Whatley's testimony in rendering its verdict. See Drury, 396 F.3d at 1308 (at trial, movant called two character witnesses "who attested to Whatley's reputation for untruthfulness"). The evidence that movant offers in support of his instant claim of actual innocence merely casts a shadow on the credibility of one of the government's witnesses, which the defense had previously challenged at trial, and does not call into question the substantive evidence presented by the government from two other witnesses. Without more, movant has failed to meet his burden of establishing that no reasonable juror would have voted to find him guilty beyond a reasonable doubt, and his assertions of actual innocence must fail.

III. CONCLUSION

Based on the foregoing, movant's motion seeking relief pursuant to § 2255 is untimely. Movant has failed to demonstrate that the rare, extraordinary circumstances that justify equitable tolling exist in this case, and he has failed to establish his "actual innocence" in order to excuse the belated filing of his motion. Accordingly, the government's motion to dismiss should be GRANTED and the instant motion should be DISMISSED.

SO REPORTED AND RECOMMENDED.

28 U.S.C. § 2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-12130-E

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
July 6, 2007
THOMAS K. KAHN
CLERK

CARL M. DRURY, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appelee,

Appeal from the United States District Court
for the Southern District of Georgia

ORDER:

Appellant's motion for certificate of appealability is GRANTED on the following issue only:

Whether the district court erred in dismissing appellant's 28 U.S.C. § 2255 motion as time-barred based on a finding that appellant's conviction became final on the date the Supreme Court denied his

petition for a writ of certiorari rather than the date the Supreme Court denied his petition for rehearing?

s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE